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In The

Supreme Court of the United States

October Term, 1988

MITSUE TAKAHASHI,

Petitioner,

v.

LIVINGSTON UNION SCHOOL DISTRICT, BOARD OF EDUCATION OF LIVINGSTON UNION SCHOOL DISTRICT, HAROLD THOMPSON, DALE EASTLEE, AND HAMILTON BRANNAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether petitioner has a right protected by the Due Process and Equal Protection provisions of the Fourteenth Amendment to a full and fair opportunity to litigate in court her grievance that respondents had subjected her to race, sex, and age discrimination.

2. Whether the California Court of Appeal denied petitioner due process of law and the equal protection of the laws by applying res judicata to preclude petitioner from litigating her civil rights discrimination grievance, when petitioner did not have a full and fair opportunity to litigate that issue in the earlier case.

LIST OF INTERESTED PARTIES

Rule 28.1

The caption of the case in this court contains the names of all directly interested parties. All tenured teachers in California have a vital interest in the outcome of this case.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

Petitioner, Mitsue Takahashi, respectfully prays the Court to issue a writ of certiorari to review the judgment and decision of the Court of Appeal of the State of California, Fifth Appellate District, entered July 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeal of California, Fifth Appellate District, affirming the grant of summary judgment by the California Superior Court of Merced

County is reported at 202 Cal. App. 3d 1464 (1988), and is set forth as Appendix A. The Order of the Superior Court granting summary judgment to respondents is set forth as Appendix B.

The Court of Appeal ruled that petitioner's claims were barred by *California Teacher's Ass'n v. Governing Board*, 144 Cal. App. 3d 27 (1983), *cert. den., Takahashi v. Governing Board*, 465 U.S. 1008, Appendix C. The Superior Court's Findings of Fact and Conclusions of Law in that case is set forth as Appendix D.

JURISDICTION

The decision and judgment of the California Court of Appeal below was filed and entered on July 25, 1988. A duly filed petition for review was denied by the California Supreme Court on October 12, 1988. A copy of the Supreme Court's Order is set forth as Appendix E. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES

The Fourteenth Amendment to the Constitution of the United States provide in part that "no state shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of California's Government Code, Education Code, and Code of Civil Procedure are set forth as Appendix F.

STATEMENT OF THE CASE

Petitioner Mitsue Takahashi, a graduate of Stanford University and holder of a graduate degree in education, started teaching at respondent Livingston Union School District in 1960. After a three-year probationary period respondent employed petitioner on a permanent basis. For eighteen years petitioner was recognized as a highly competent, successful teacher who fulfilled all of her responsibilities in an exemplary manner. Year after year she received favorable performance evaluations reflecting that she complied with all rules, regulations and laws. Her principals from 1960 to 1978 never found fault with her classroom performance, including Gregg Fitzgearl, who visited petitioner's classroom thirty to forty times a year during his 10-year term ending in 1978. Mr. Fitzgearl's evaluation in 1977 was very positive and noted appropriate student behavior and an orderly learning environment. It is undisputed that petitioner's students met all the academic standards appropriate to measure the skill with which she imparted information relevant to the subjects she covered. Petitioner encouraged students to participate in student government and in 1980, the year petitioner was dismissed, the number of students selected to speak at the graduation from her class exceeded those of any other teacher in the district.

During her teaching career respondent district appointed petitioner to be the Student Council adviser, recommended her to teach college workshops for teachers, and recommended her to represent the district on the Livingston Community Recreation Commission. The District appointed her to chair its mathematics and science curriculum to update projects and to supervise students on out-of-town trips, including the "Math Superbowl Day."

In 1978 respondent Dale Eastlee became principal at petitioner's school, and in that year he gave petitioner the first negative evaluation she had ever received. Eastlee gave petitioner a second negative evaluation in April 1979. Respondent Hamilton Brannan succeeded Eastlee as principal and in November 1979, two months after he assumed the position of principal, he gave petitioner a negative evaluation. It was respondent Brannan who decided that petitioner should be discharged as "incompetent."

On June 26, 1980, petitioner was served with an "accusation" informing her that she would be dismissed as "incompetent" unless she demanded a hearing within 15 days. App. 5. The hearing referred to was held on October 21, 1980, before the Commission on Professional Competence, an ad hoc lay body with no expertise in the prevention or remedying of civil rights discrimination. The Commission consisted of a teacher selected by petitioner, a school administrator selected by the respondent district, and a hearing officer of the State Office of Administraive Procedure.

At the hearing petitioner challenged the Commission's jurisdiction on the ground that the District had failed to adopt uniform objective guidelines for evaluation and assessment of the performance of certificated personnel as required by the Stull Act (Cal. Ed. Code § 44660 et seq.). App. 6. That challenge was denied. In addition to the jurisdictional challenge petitioner raised at the administrative hearing the following issues in her defense: (1) that her students had good test scores; (2) that certain disruptive students who should not have been in the same room had been put in her classroom; (3) that other classes were also noisy; (4) that the criteria for judging incompetency were inadequate and not uniform so that no objective, verifiable termination of plaintiff's competency or incompetency could be established; and (5) that she believed she was doing as good a job as the other teachers. App. 6.

Petitioner did not raise in the administrative hearing any defense based on employment discrimination in violation of California's Fair Employment & Housing Act (hereafter FEHA), App. 7, nor did she assert any affirmative claims against any of the respondents.

On November 6, 1980, the Commission voted 2 to 1 to dismiss petitioner as "incompetent" because she allegedly was unable to maintain a suitable learning environment. The teacher member of the Commission found petitioner competent in all respects. After petitioner's dismissal became final, the California Commission for Teacher Preparation and Licensing initiated an investigation to determine whether petitioner's lifetime teaching credentials should remain continually valid. Petitioner explained at length the circumstances under which she

was dismissed, and furnished written evidence attesting to her competency. Thereafter, on February 19, 1985 the Commission notified petitioner that:

> The Commissioner of Credentials has completed its review of your case and having no probable cause to revoke or suspend your credentials, has ordered the investigation closed.

In sum, after respondent school district found petitioner incompetent the State Commission on Teacher Credentialing found her competent.

A. The First Proceeding: Judicial Review of the Decision of the Commission on Professional Competence.

On December 4, 1980, petitioner filed a petition for a writ of mandate pursuant to Cal. Code of Civil Proc. § 1094.5, seeking review of the Commission's decision. Under that section a writ for the purpose of inquiring into the validity of a final administrative decision is limited to the questions whether the agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Where as here, the Court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established only if the Court determines that the findings are not supported by the weight of the evidence. Under the limited judicial review afforded by § 1094.5 petitioner could not raise, and did not raise, any issue concerning civil rights discrimination, or the conspiracy engaged in by the individually named respondents to deny petitioner her civil rights.

As the Court below noted the petition alleged that,

> (1) The Commission committed a prejudicial abuse of discretion in that the findings of the Commission were not supported by the evidence and the findings did not support the decision of incompetency; (2) the Commission proceeded without or in excess of its jurisdiction because incompetency may only be proved by reference to uniform, objective standards, which the district did not have; and (3) the district lacked jurisdiction to proceed because it failed to include with the 90-day notice an Education Code Section 44660 evaluation (Ed. Code, § 44938), and since the focus of a charge of teacher incompetence is whether or not the students learned the required material, the charge was rebutted by evidence that plaintiff's students accomplished their academic goals.

App. 7.

The Superior Court denied the petition and upheld the discharge, and the California Court of Appeal affirmed. *California Teacher's Ass'n v. Governing Board, supra,* 144 Cal. App. 3d 27 (1983), *cert. den., Takahashi v. Governing Board,* 465 U.S. 1008.

The Court of Appeal recognized that the school district had failed to establish a uniform system of evaluation and assessment as required by the Stull Act, but found the failure harmless. App. 42. Addressing the issue of petitioner's competence, the Court acknowledged that petitioner's students met the academic standards appropriate to measure the skill with which she imparted information relevant to the subjects she covered, adding however that teaching good behavior standards is no less important than imparting knowledge competently. App.

45 n.4. After stating that "[t]he essence of the charge against [petitioner] was that she was unable to maintain an orderly classroom," App. 45, the Court concluded that there was sufficient evidence to support the trial court's decision that "[i]n the aggregate, the events and facts [found by the Trial Court to be true] constitute cause for the dismissal of [Takahashi]. . . ." App. 49-50.

Plainly the mandamus action did not address the issue of employment discrimination in violation of the FEHA, nor did it address petitioner's claim that the individually named respondents had conspired to deprive her of her civil rights.

B. Petitioner's Actions Under California's Fair Employment & Housing Act, and Under the Common Law.

On October 28, 1981, petitioner filed a timely complaint with the California Department of Fair Employment & Housing (Department) alleging that the respondents had subjected her to employment discrimination in violation of the FEHA. On April 1, 1982, the Department advised petitioner that her complaint was on file and that it would contact her when the complaint was under active investigation. Petitioner was also advised that if she chose to do so, she could file a private lawsuit. Petitioner elected to avail herself of her right to sue conferred by the Department. *See* Cal. Gov't Code § 12930.

On March 31, 1983, petitioner filed a timely action in the Superior Court alleging that the district and the individually named respondents had dismissed her because

of race, sex, and age in violation of the FEHA, and that the individually named respondents had conspired to cause her dismissal for discriminatory reasons. Respondents moved for summary judgment asserting that res judicata barred petitioner's causes of action. The Superior Court agreed stating – erroneously – that the issues petitioner sought to litigate "were litigated or could have been litigated, in the prior action." App. 34.[1]

Petitioner appealed, asserting that she had not litigated her employment discrimination and conspiracy claims and had not been given a full and fair opportunity to do so, in violation of her constitutional rights. The Court of Appeal held that the superior court's denial of the petition for writ of mandate barred petitioner from litigating her claim that she was "discriminated against in violation of her constitutional and civil rights," App. 26, without commenting on petitioner's argument that she did not have a full and fair opportunity to present those issues in the mandamus proceeding.

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[1] The Superior Court also ruled that a prior federal court action was res judicata. *Takahashi v. Governing Board*, 783 F.2d 848 (9th Cir., 1986), *cert. den.* 476 U.S. 1182. The California Court of Appeal below discussed this action and ultimately concluded that it did "not need to decide whether the federal court judgment is res judicata" relying instead on its conclusion that "the state court's denial of [petitioner's] petition for writ of mandate . . . does bar these consolidated cases." App. 33. Accordingly, petitioner does not further discuss the federal action.

As the Court viewed it petitioner's failure to present her employment discrimination and conspiracy claims as a defense before the Commission on Professional Competence totally barred her from litigating them in court. App. 23. The Court failed to comment on petitioner's argument that she properly did not raise the unlawful discrimination issue before the Commission because the Commission had no jurisdiction to adjudicate an FEHA claim and because the Commission lacked expertise in the prevention and remedying of civil rights discrimination. *See State Personnel Board v. Fair Employment & Housing Com.*, 39 Cal. 3d 422, 432 (1983) ("The Commission and Department [of FEH] have 25 years of administrative expertise solely in the prevention and remedying of civil rights discrimination, and thus have more specialized expertise in this area than does the [State Personnel] Board."). *See also* Cal. Gov't Code § 12993(c) ("[I]t is the intention of the Legislature to occupy the field of regulation of discrimination in employment . . . encompassed by the provisions of this part, exclusive of all other laws banning discrimination on employment . . . by any city, city and county, county, or other political subdivisions of this state. . . . ")

The Court rejected petitioner's argument that the mandate proceeding could not bar her claim that the individually named respondents had conspired to deprive her of her civil rights, because they were not parties to that proceeding, and because the issues were different. The Court stated that petitioner "cannot prevail against [the individually named respondents] on the basis that their conduct toward her that caused her termination was wrongful in the face of a final state court

determination in the first action that the District had the right to terminate her for incompetency." App. 26.

REASONS FOR GRANTING THE WRIT

The Court below acted wholly irrationally, and violated due process of law and the equal protection of the laws when it held that the Superior Court's denial of the petition for writ of mandate in the prior action bars petitioner from litigating her employment discrimination and conspiracy claims in this case. The decision is in conflict with this Court's repeated admonition that res judicata cannot apply when, as here, the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case.

The issue presented in this case is of great importance to all tenured teachers in California. The effect of the ruling below is to deny them a meaningful opportunity to litigate in court an employment discrimination claim under California's Fair Employment Act, when they file a mandamus petition to review an adverse administrative determination in accordance with California's Education Code.

A. The Due Process Clause of the Fourteenth Amendment Protects Petitioner's Right to a Full and Fair Opportunity to Litigate Her Employment Discrimination and Conspiracy Claims.

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in

the courts . . . as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). *Logan* specifically held that a state-created right to redress discrimination is a protected property interest under the Fourteenth Amendment, *id.* at 431, and that the Due Process Clause imposes constitutional limitations upon the power of courts to deny litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard on the claimed right[s]." *Id.* at 430 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (the right to due process is conferred, not by legislative grace, but by constitutional guarantee.).

Where interests of basic importance are involved, as they are in this civil rights discrimination case, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Logan* at 430 n.5 (quoting *Boddie, supra*, at 377). *See Little v. Streater*, 452 U.S. 1, 16 (1981) ("[A] cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.").

B. Petitioner Was Denied A Full And Fair Opportunity To Litigate Her Employment Discrimination and Conspiracy Claims.

The Court has repeatedly recognized that res judicata cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Allen v.*

McCurry, 449 U.S. 90, 95 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1970).

Petitioner never had any opportunity to litigate her conspiracy claims against the individually named respondents, who were not defendants in the mandamus proceeding. While a person not a party to a prior suit may successfully assert collateral estoppel as a defense, that defense "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948). The employment discrimination and conspiracy claims raised in the case at bar are not identical to the issue decided in the first proceeding. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974) (In filing an employment discrimination claim under Title VII an employee asserts independent statutory rights granted by Congress. "The distinctly separate nature of these contractual and statutory rights . . . is not vitiated merely because both were violated as a result of the same factual occurrence."). *See also, State Personnel Bd. v. Fair Employment & Housing Com., supra*, 445 (Grodin, J., concurring) (discrimination based on a "medical appeal" is not the same as a claim of discrimination based on physical handicap. The case involved "not a twice bitten apple but (to squeeze the metaphor) an apple and an orange.").

The Court below recognized that petitioner had not litigated her claim against the individually named

respondents who were not parties to the first action, stating:

> [Petitioner] has alleged conspiracy among the defendants who "set her up" by violating her constitutional and civil rights. Yet [petitioner] admits in her [court] complaint that the discrimination defense was not raised at the administrative hearing. Neither was the issue raised in the first action. It is just such a case as this in which such allegations must be brought at the earliest opportunity, in this case before the Commission, so that the matter can be resolved.

App. 31.

Contrary to the Court's assertion, petitioner could not have raised her conspiracy action against the individually named respondents before the Commission on Professional Competence because the Commission has no jurisdiction or authority to entertain an action against individuals. More to the point, the Commission was simply not the tribunal in which to litigate the conspiracy and employment discrimination actions.

The Commission is a lay ad hoc body with no expertise in the prevention or remedying of civil rights discrimination. By contrast, the commission and Department created by the FEHA "have 25 years of administrative expertise solely in the prevention and remedying of civil rights discrimination, and have more specialized expertise in this area" than any other administrative body. *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal. 3d at 432.

The FEHA is a comprehensive scheme for the realization of California's public policy "to protect and safeguard the right and opportunity of all persons to seek,

obtain, and hold employment without discrimination or abridgment on account of race . . . sex, or age." Cal. Gov't Code § 12920. The Court denied petitioner the opportunity to avail herself of the FEHA remedies, stating, "while [petitioner] may have an absolute right to bring suit under the Act, she does not have an absolute right to prevail." App. 23. The Court misconstrued petitioner's claim. Her claim is that she has a constitutional right to a full and fair opportunity to litigate her FEHA claim and that the application of the doctrine of res judicata to deny her that right is prohibited by the due process and equal protection provisions of the Fourteenth Amendment.

C. Petitioner Was Denied Equal Protection Of The Laws In Violation Of The Fourteenth Amendment When She Was Deprived Of The Opportunity, Available To All Other Californians, To Litigate Her Claim That She Was Dismissed Because Of Discrimination Based On Race, Sex, And Age.

The Equal Protection Clause guarantees at a minimum that state laws (including those created by the judiciary) classify the persons it affects in a manner rationally related to legitimate government objectives. *Logan v. Zimmerman Brush Co., supra,* at 439 (concurring opinion of Justice Blackmun, joined by Justices Brennan, Marshal and O'Connor). Where, as here, interests of basic importance are involved the classificatory scheme must advance state interests "of overriding significance." *Id.* at 429 n.5.

California recognizes that the practice of discrimination in the terms of employment based on race, sex, and age foments domestic strife and unrest, deprives the state

of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the general public, Cal. Gov't Code § 12920. Because the purpose of the FEHA is to provide effective remedies which will eliminate such discriminatory practice, California has declared that the opportunity to hold employment without discrimination is recognized and declared to be a civil right. Cal. Gov't Code § 12921.

The FEHA was meant to give employees the maximum opportunity to vindicate their civil rights against discrimination, and a person claiming employment discrimination generally has a right to avail herself of the procedures and remedies of the FEHA, even *after* an adverse adjudication involving the same factual occurrence. *State Personnel Bd. v. Fair Employment & Housing Com., supra,* at 434 (An employee subjected to employment discrimination is entitled to one full and fair opportunity to litigate her claim under the FEHA because of "the superior rights and remedies afforded to discrimination complainants under the FEHA.").

The Court's decision, depriving petitioner of a full and fair opportunity to litigate her claim of employment discrimination in violation of the FEHA, violates the Equal Protection clause of the Fourteenth Amendment because it cannot be justified as advancing any state interest of overriding significance nor does it even rationally advance a reasonable and identifiable governmental interest.

CONCLUSION

For the aforesaid reasons, the petition for writ of certiorari should be granted.

Dated: January 9, 1989

Respectfully submitted,

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EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MITSUE TAKAHASHI, Plaintiff and Appellant, v. BOARD OF EDUCATION OF LIVINGSTON, UNION SCHOOL DISTRICT et al., Defendants and Respondents.	F008684 (Super. Ct. No. 70836)
MITSUE TAKAHASHI, Plaintiff and Appellant, v. LIVINGSTON UNION SCHOOL DISTRICT et al., Defendants and Respondents.	(Super. Ct. No. 71869) *O P I N I O N* (Filed July 25, 1988)

APPEAL from a judgment of the Superior Court of Merced County. George C. Barrett, Judge.

Douglas B. Cone for Plaintiff and Appellant.

Loren E. McMaster, Blumberg, Kerkorian, Andreen, Seng & Ikeda, Dale Ikeda, Lee and Hui, Michael G. W. Lee, Takamine & Huang and Gene L. Takamine as amici curiae on behalf of Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Paul M. Loya, Peter J. Lucey, and Angela K. Kreta for Defendants and Respondents.

-ooOoo-

Plaintiff Mitsue Takahashi appeals from a judgment dismissing her causes of action against defendants Livingston Union School District, Board of Education of Livingston Union School District, Harold Thompson, Dale Eastlee and Hamilton Brannan after the trial court granted defendants' motions for summary judgment in consolidated proceedings Nos. 70836 and 71869.

The basic issue on appeal is whether or not the judgments in the litigation previously initiated by plaintiff in both California and federal courts against one or more of the defendants in these consolidated actions operate as a bar to the present actions under res judicata principles. Decision on the issue presented requires us to determine the relationship between the procedures under the California Fair Employment Practices Act (Gov. Code, § 12900 et seq.) and the schoolteacher dismissal procedures. We will conclude that the judgments in the previous litigation are res judicata on the issues in the consolidated actions and will affirm the judgment.

PROCEDURAL BACKGROUND

Our statement of the procedural background is based upon the record before this court in case No. F00235 as well as the record in the present action, F008684. The record in case number F00235 provided the basis for this court's decision in *California Teachers Assn. v. Governing*

Board (1983) 144 Cal.App.3d 27. This court takes judicial notice of its own record in that case.

Plaintiff was employed by the Livingston Union School District (district) in 1960 and continued in employment there until the fall of 1980, rendering her at the time of the hearing a permanent or tenured teacher.[1]

On May 8, 1978, plaintiff was given an evaluation of her job performance. That evaluation isolated problems with classroom management as a specific concern. She was notified at that time, during the 1977-1978 school year, that if satisfactory improvement were not shown, formal dismissal proceedings would be initiated during the 1978-1979 school year.

In an April 1979 formal evaluation of plaintiff's performance, lack of student control and classroom management were again isolated as serious problems. That evaluation recommended the giving of a 90-day notice pursuant to Education Code section 44938 and the initiation of dismissal proceedings if improvement were not

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[1] Former Education Code section 44882 (repealed by Stats. 1987, ch. 1452) provided: "Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district."

All future references to the Education Code will be to the text of the Code as it read in 1980.

shown.[2] Promptly after that evaluation was submitted, Plaintiff was given a section 44938 90-day notice of specific areas of deficiency in her teaching, setting forth specific instances on which the notice was based. At that time, plaintiff was notified that the specific instances were considered of such significance that her failure to correct the faults might result in the district filing charges of dismissal against her. Attached to the 90-day notice was a copy of the formal evaluation.

On November 15, 1979, a further evaluation of plaintiff's job performance was made.[3] That evaluation noted

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[2] Education Code section 44938 provided: "The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3 of this part, if applicable to the employee. 'Unprofessional conduct' and 'incompetency' as used in this section means, and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932."

[3] Education Code section 44664 provided in pertinent part: "Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each year for probationary personnel, and at least

(Continued on following page)

several deficiencies and further noted that a variety of suggestions had been made to improve instruction and classroom management that had not been implemented. It included the statement: "if the deviciencies [sic] so noted are not significantly corrected, dismissal is recommended."

On May 12, 1980, plaintiff was issued a document entitled "notice of intent to dismiss," along with a statement of charges indicating that cause existed to dismiss her on the basis of incompetency (Ed. Code, § 44932, subd. (d))[4] and that the district intended to do so. Attached to the notice of charges was a copy of the November 15, 1979, evaluation.

On June 26, 1980, a notice of accusation was served on Plaintiff, informing her that unless she requested a hearing within 15 days the board of trustees of the district would proceed upon the accusation without a hearing. The hearing referred to is one to be held as provided

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every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance. [¶] . . . "

[4] Education Code section 44932 provided in pertinent part: "No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] (d) Incompetency. [¶] . . . "

in Education Code section 44944.[5] The hearing was held on October 21, 1980, before the Commission on Professional Competence (Commission) pursuant to Education Code section 44944.

At the termination hearing plaintiff challenged the Commission's jurisdiction based on the district's failure to comply with the Stull Act (Ed. Code, § 44660 et seq.). That challenge was denied. In addition to the jurisdictional challenge, plaintiff raised at the administrative hearing the following issues in her defense: (1) that her students had good test scores; (2) that certain disruptive students who should not have been in the same room had been put in her classroom; (3) that other classes were also noisy; (4) that the criteria for judging incompetency were inadequate and not uniform so that no objective, verifiable determination of plaintiff's competency or incompetency could be established; and (5) that she believed she was doing as good a job as the other teachers.

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[5] Education Code section 44944 provided a comprehensive scheme for the conduct of hearings to determine if cause existed to terminate permanent certificated employees of a school district. Among other things that section provided that the hearing will be initiated, conducted and a decision made in accordance with chapter 5 (commencing with § 11500) of part 1 of division 3 of title 2 of the Government Code; that the right to discovery shall include the rights and duties of any party in a civil action brought in a superior court; that continuances may be granted pursuant to Government Code section 11524 and any time lines set forth in Education Code section 44944 would be extended for a period of time equal to any such continuance; and that the time periods set forth in the applicable sections of the Government Code shall not be applied so as to deny discovery in a hearing conducted pursuant to Education Code section 44944.

There was no mention nor suggestion in the transcript of the administrative hearing of any defense based on violation of plaintiff's civil or constitutional rights.

After the administrative hearing was completed, the Commission rendered its decision on November 6, 1980, determining that certain of its findings constituted cause for the dismissal of plaintiff from her position as a permanent certificated employee of the district based upon incompetency (Ed. Code, § 44932, subd. (d)), and ordered that plaintiff be dismissed from her position effective forthwith.

On December 4, 1980, plaintiff filed in the Superior Court of Merced County a petition for writ of mandate (first action) alleging that (1) the Commission committed a prejudicial abuse of discretion in that the findings of the Commission were not supported by the evidence and the findings did not support the decision of incompetency; (2) the Commission proceeded without or in excess of its jurisdiction because incompetency may only be proved by reference to uniform, objective standards, which the district did not have; and (3) the district lacked jurisdiction to proceed because it failed to include with the 90-day notice an Education Code section 44660 evaluation (Ed. Code, § 44938), and since the focus of a charge of teacher incompetence is whether or not the students learned the required material, the charge was rebutted by evidence that plaintiff's students accomplished their academic goals. (Code Civ. Proc., § 1094.5, subd. (b).) That petition named both the California Teachers' Association (CTA) and Mitsue Takahashi as plaintiffs.

On May 1, 1981, the petition in the first action was argued and denied. The reporter's transcript of that hearing shows that plaintiff elected to argue only the lack of jurisdiction of the Commission to dismiss plaintiff because of the failure of the district to comply with the provisions of the Stull Act. The action was dismissed and judgment entered on June 9, 1981.

A notice of appeal was filed on August 5, 1981. This court affirmed the trial court's denial of the petition in the first action. That opinion was certified for publication and appears as *California Teachers Assn. v. Governing Board, supra,* 144 Cal.App.3d 27. A petition for rehearing in this court and a petition for hearing in the California Supreme Court were denied. Plaintiff also petitioned the United States Supreme Court; certiorari was denied by the United States Supreme Court (1984) 465 U.S. 1008, No. 83-1029.

On November 10, 1983, plaintiff filed an action in the United States District Court for the Eastern District of California for damages and injunctive relief based on 42 United States Code sections 1981 and 1983 (hereafter federal court case). The district court held that the decision in the first action precluded plaintiff's federal court case. The United States Court of Appeals for the Ninth Circuit affirmed that holding in *Takahashi v. Bd. of Trustees of Livingston* (9th Cir. 1986) 783 F.2d 848, and certiorari was denied by the United States Supreme Court (1986) 476 U.S. 1182, No. 85-1732.

On November 15, 1982, plaintiff filed a complaint in the Superior Court of Merced County for damages, case number 70836. That complaint (hereafter the common law

case) alleged causes of action for breach of employment contract and conspiracy to defraud. It specifically alleged that plaintiff's employment contract was breached by the district's "terminating the plaintiff without just cause" and cited seven specific instances of such breach. The second cause of action alleged that various district employees conspired to "set the plaintiff up" to "attempt to show justification in terminating the plaintiff." The complaint in the common law case was amended on September 22, 1983, to add causes of action for intentional and negligent infliction of emotional distress.

On March 31, 1983, a separate complaint, case number 71869, was filed seeking "monetary, injunctive and declaratory relief." That complaint (hereafter the civil rights case) alleged causes of action for (1) wrongful discharge from employment for exercise of plaintiff's First Amendment rights of freedom of speech and association; (2) unconstitutional discharge from employment for exercise of right of liberty and property in employment in violation of the right to due process (the complaint specifically alleged that: (a) plaintiff was terminated from her employment because she held a job outside of her teaching job, and (b) her right to due process was violated since no allegations or charges relating to her outside employment were made); (3) termination of employment in violation of equal protection of the laws, specifically that she was terminated for holding outside employment and that other people holding outside employment were not similarly terminated; (4) discrimination in employment on account of race and ancestry, alleging that plaintiff was terminated from her employment because defendants were "motivated by

pejorative stereotypes and biases as to Japanese persons"; (5) discrimination in employment on account of sex, alleging that defendants terminated plaintiff because they used "sex differential criteria in evaluation and criticism of Takahashi"; (6) discrimination in employment on account of age, alleging "in terminating Takahashi's employment based upon alleged 'incompetence' purportedly consisting of an inability to control student behavior, defendants employed age-differential criteria."

After demurrers to the complaints in both the common law and civil rights cases were overruled, answers were filed in both actions. Each answer denied the allegations of the complaint and raised certain affirmative defenses, including failure to exhaust administrative remedies, res judicata and unclean hands.

After the common law and civil rights cases were consolidated pursuant to stipulation, defendants moved for summary judgment. The motion was heard, and about three weeks later an untitled document was filed in the consolidated action reading in its entirety as follows: "Defendants have moved for summary judgment in these consolidated actions. [¶] This court concludes that previous State and Federal court litigation bars these actions on the basis of res judicata. [¶] There are no material facts in dispute and defendants are entitled to a judgment as a matter of law. [¶] The issues here present were litigated or could have been litigated in prior administrative and mandamus proceeding. [¶] The motion is granted in both these actions." Based on this grant of the motion for summary judgment, the trial court entered a judgment dismissing the consolidated actions.

DISCUSSION

I. *Did the trial court err in concluding that the judgment in the first action and/or the federal court case operates as a bar to these consolidated actions?*

To determine if either judgment operates as a bar, we will examine the doctrines of res judicata and collateral estoppel and the relationship of those principles to the administrative hearing and the petition in the first action. We then apply the elements of res judicata to these consolidated actions to determine whether the same primary right is being asserted here as in the former cases and if it is being asserted against the same parties or those in privity with such parties. Finally, we will consider the effect of issues that were not litigated and the impact of claims that plaintiff asserts could not have been raised at the time of the administrative hearing or the first action.

Standard of Review

On appeal from the granting of a motion for summary judgment, our review is limited to the facts shown in the documents presented to the trial court in independently determining their construction and effect as a matter of law. (*Bonus-Bilt, Inc. v. United Grocers, Ltd.* (1982) 136 Cal.App.3d 429.) Thus this court reviews the actions of the trial court for abuse of discretion as to the factual allegations and looks independently at the legal effects of those facts.

The only material facts brought to the trial court's attention in the consolidated action to bar plaintiff's common law and civil rights causes of action related to the first action and the federal court case. Thus we are

required independently to determine the legal effect of those facts.

The California Supreme Court has recognized that "A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) This doctrine is commonly referred to as res judicata. A secondary aspect of res judicata is collateral estoppel. (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880.) Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 604.) Traditionally the doctrine has been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding. (*People v. Sims* (1982) 32 Cal.3d 468, 477.)

Plaintiff seems to be saying in part that the underlying action cannot be res judicata since the original action was an administrative rather than a judicial proceeding. *People v. Sims*, supra, stands for the proposition that the final judgment of an administrative hearing may have collateral estoppel effect in a subsequent court proceeding (in that case a criminal proceeding). However, plaintiff is mistaken in believing that it is the administrative proceeding that serves as the bar in this case. The first action (in the superior court) is the state court proceeding upon which the trial court based its finding of res judicata as to the consolidated actions. As discussed, that first action was brought by plaintiff in December 1980. The trial court independently reviewed the record of the administrative hearing, held a hearing at which plaintiff

had the opportunity to present any argument to the court, and determined independently that cause existed to dismiss plaintiff on the basis of incompetency. That judgment has long since become final.

A. The primary right involved here is the same as in the first action.

Plaintiff has argued that she is not precluded from bringing the present actions since she did not assert the violation of the same rights as defenses to termination for cause in the first action. She points out that her actions involve a different primary right and the Commission did not have the authority to award her punitive damages, thus precluding an appropriate remedy in that forum.

To determine the scope of causes of action, California courts employ the "primary rights" theory. Under this theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, "the significant factor is the harm suffered." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954.)

The United States Court of Appeals for the Ninth Circuit in *Takahashi v. Bd. of Trustees of Livingston, supra,* 783 F.2d 848 concluded that plaintiff's federal court case was barred by the res judicata effect of the prior state court judgment denying plaintiff's petition in the first action. Plaintiff's complaint in the federal court case alleged that the district violated her rights under the Fourteenth Amendment to the United States Constitution and 42 United States Code sections 1981 and 1983 by (1) terminating her employment on account of her sex and ethnic origin, (2) terminating her employment on the

basis of the impermissibly vague requirement that she maintain a suitable learning environment in her classroom, and (3) employing methods of evaluating her job performance that were different from those employed to evaluate the performance of others similarly situated.

That court characterized plaintiff's first action as an action based on the invasion of her contractual right to employment by the district. It then determined that the identical primary right, the contractual right to employment, was at stake both in the first action and in the federal court case. Quoting from *Agarwal v. Johnson, supra,* 25 Cal.3d 932, 955, the court noted that in determining the primary right at stake, " 'the significant factor is the harm suffered.' " (*Takahashi v. Bd. of Trustees of Livingston, supra,* 783 F.2d at p. 851.) The court went on to say, "Absent termination of her employment contract, Takahashi suffered no harm. Takahashi's allegations of mental distress caused as a result of her dismissal do not present a separate injury. Rather, any such distress would be a consequence of the District's violation a [*sic*] Takahashi's primary contractual right. Consequential damages cannot support a separate cause of action." (*Ibid.*, fn. omitted.)

Plaintiff has again cited *Agarwal* as support for her position that separate primary rights are involved. *Agarwal* does appear to support plaintiff's position, but it is distinguishable. In that case, the plaintiff was terminated from private employment without notice. He was notified on September 25 that he had been terminated on September 17, 1970, for insubordination. He was not able to find work for 13 months. The plaintiff's former employer made unfavorable statements about him to prospective

employers. Agarwal then sued his employer for defamation and emotional distress. Before the state court case came to trial, a federal court action on the individual and class claims of discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e) et seq.) was concluded.

The California Supreme Court concluded in *Agarwal* that the federal court's determination of the claims under title VII of the Civil Rights Act of 1964 was not res judicata as to the issues raised in the state court proceeding because the harm for which Agarwal recovered damages in the state court action was different. It pointed out:

> "Our review of the district court's findings of fact discloses that its attention was primarily directed to McKee's [the defendant's] employment practices and the corresponding impact on racial minorities, and to statistical analyses of the McKee employee population. Although Agarwal's state court claims for defamation and intentional infliction of emotional distress arose in conjunction with the alleged violation of title VII, the fact remains that in the present action he was awarded damages for harm distinct from employment discrimination. (Cf. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 49-50, & fn. 10 . . . ." (*Agarwal v. Johnson, supra,* 25 Cal.3d at p. 955.)

All of plaintiff's alleged causes of action in this consolidated action arise in conjunction with or as a result of the alleged wrongful termination of her employment. Indeed, plaintiff specifically alleges that each act complained of caused the dismissal (wrongful discharge, conspiracy, unconstitutional discharge, discharge in violation of state civil rights) or was a consequence of the termination (emotional distress, damages), part and parcel of the violation of the single primary right, the single harm

suffered. (See also *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 446-448.) Plaintiff's allegations of consequential injuries are not based upon infringement of a separate primary right.

Plaintiff has further argued that even if the same primary right is involved, the Commission could not have awarded punitive damages and she should therefore be able to bring a separate suit for punitive damages.

We agree that the Commission did not have jurisdiction to award damages, either consequential or punitive. The power of the Commission is restricted by the terms of Education Code section 44944, subdivision (c), providing that the Commission shall prepare a decision containing findings of fact, determinations of issues and a disposition that the employee should or should not be dismissed.

However, we disagree that the Commission's lack of authority to award damages somehow excuses plaintiff's failure to present her defenses to the district's charges of incompetency at the termination hearing. There can hardly be justification for such a position. Government Code sections 11505 and 11506 give the plaintiff the right to interpose any defense, and the Commission is required to make findings of fact and determination of issues. Right of discovery is the same in proceedings before the Commission as in civil lawsuits and continuances may be had.[6] (*Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560; Gov. Code, § 11524.)

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[6] Sections 11500 through 11528 of the Government Code set forth the procedures for "Administrative Adjudication."

(Continued on following page)

If violation of constitutional and civil rights had been alleged and proved in proceedings before the Commission to determine whether the district had cause to terminate plaintiff for incompetency, such violation would have made the termination wrongful. Plaintiff would then have been in a position to bring a lawsuit against defendants based on violation of her constitutional rights alleging the damages she suffered thereby, supported by the findings of the Commission. She would also have retained her position and mitigated any possible damages.

B. *The district's employees may assert the first action as a bar to plaintiff's causes of action in this consolidated action even though they were not parties to the first action.*

Plaintiff has additionally contended that even if the doctrine of res judicata or collateral estoppel bars her causes of action against the district in these proceedings, her causes of action against the individually named defendants who were not defendants in the first action

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Those procedures were used in 1980 and today for the conduct of termination hearings for permanent certificated employees of school districts. They provide for, among other things, the appointment of hearing officers (Gov. Code, § 11502), the service of the accusation (complaint) against the employee (Gov. Code, § 11505), the right of the employee to interpose a defense (Gov. Code, §§ 11505, 11506), provisions for discovery (Gov. Code, §§ 11507.5-11507.7), time and place of hearing (Gov. Code, § 11508), notice of hearing (Gov. Code, § 11509), service of subpoenas (Gov. Code, § 11510), rules of evidence (Gov. Code, § 11513), form of decision (Gov. Code, § 11518), and judicial review (Gov. Code, § 11523).

are not similarly barred. However, since *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, mutuality has not been a prerequisite to asserting the defense of res judicata in California. One not a party to a prior suit may successfully assert collateral estoppel as a defense if: (1) the issue decided in the prior action is identical to the one presented in the action in which the defense is asserted; (2) a final judgment has been entered in the prior action on the merits; and (3) the party against whom the defense is asserted was a party to the prior adjudication. (*Id.* at p. 812; see also *Alhino v. Starr* (1980) 112 Cal.App.3d 158, 179.) Here, all three of the individually named defendants were employees of the district and were acting within the course and scope of their employment in terminating plaintiff from her teaching position. They are sued solely because of their involvement in the termination process. The party against whom the bar is being asserted is identical to the one in the prior lawsuit. Since all of the prerequisites to asserting the defense of res judicata or collateral estoppel as stated in *Bernhard v. Bank of America, supra,* are satisfied, the district's employees are entitled to assert the decision in the first action as a bar to these consolidated actions.

C. *The Fair Employment Practices Act remedy does not prevent the judgment in the first action from being res judicata.*

Plaintiff has noted that she has an "absolute right" to bring a private civil lawsuit under the California Fair Employment Practices Act (the Act). She contends she could not have brought such a suit until after the hearing was held on her petition in the first action. She argues on

that basis the decision on the petition in the first action cannot preclude her assertion of her claim of job discrimination under the Act. Her reasoning is flawed; while of course she does have a right to bring a lawsuit, that lawsuit may be barred by the decision in a prior lawsuit.

The Act, enacted in 1959 and recodified in 1980, is administered by the Fair Employment and Housing Commission (Housing Commission). The Housing Commission performs adjudicatory and rulemaking functions (Gov. Code, § 12935). The second of the two administrative bodies created by the statute is the Department of Fair Employment and Housing (Department), whose function is to investigate, conciliate, and seek redress of claimed discrimination (Gov. Code, § 12930). The law establishes that freedom from job discrimination as specified is a civil right (Gov. Code, § 12921). The Act is an attempt by the Legislature to "occupy the field" of regulation of discrimination in employment and housing (Gov. Code, § 12993, subd. (c)).

Any person aggrieved may file a verified complaint with the Department. (Gov. Code, § 12960.) The Department is obligated to investigate each claim filed. (Gov. Code, § 12963.) If resolution of the matter by conference or conciliation fails or seems inappropriate, the Department may issue an accusation to be heard by the Housing Commission. The Department acts as prosecutor on the accusation and argues complainant's case before the Housing Commission. If an accusation is not issued within 150 ~~d~~days after the filing of the complaint, the Department must give the complainant a right-to-sue letter. The Department may give such letter earlier if it decides not to prosecute the case and the matter is not

otherwise resolved. Upon receipt of the right-to-sue letter, the complainant may then bring a civil action in superior court. (Gov. Code, § 12965, subd. (b).)

The underpinning of plaintiff's argument regarding her causes of action under the Act is that she could not have filed a civil suit thereon until she exhausted the administrative remedies set out in the Act, and that the time needed to exhaust those remedies ran beyond the time of the dismissal hearing and the hearing on her petition in the first action.

The applicable time lines under the Act are that the complaint must be filed with the Department within one year of the alleged discrimination (which may be extended for no more than 90 days if the aggrieved person first learned of the unlawful practice after the expiration of the one-year period) (Gov. Code, § 12960); the Department must decide to issue an accusation or a right-to-sue letter within 150 days after the complaint is filed; and the complainant must bring civil suit, if at all, within one year of the date of the right-to-sue letter (Gov. Code, § 12965). Plaintiff's argument is that she has an absolute right to bring suit under the Act any time within approximately two and one-half years after the alleged act of discrimination, which plaintiff defines as her termination.

Plaintiff was first informed on May 8, 1978, that she would be dismissed if certain improvements were not made in her job performance. Not until three and one-half years later did plaintiff file a charge of discrimination with the Department. This filing was also fully a year after the actual termination of her employment. In that

charge, she alleged only that she was being discriminated against because of her Japanese ancestry. A right-to-sue letter want sent to plaintiff on April 1, 1982, notifying her that if she intended to file a private lawsuit she should file the case within one year from the date of the letter. Almost 18 months after plaintiff filed the charge and almost a year after the right-to-sue letter was issued, counsel for plaintiff requested that plaintiff's charge of discrimination be amended to include additional grounds of race, age, and sex. By letter dated March 7, 1983, plaintiff was informed that the time within which an amendment could be made had "elapsed"; that letter further stated: "In review and discussion between Ms. Takahashi and the assigned consultant, it was determined that the complaint would not be amended to include an additional basis." Although this court might view plaintiff's claim as to age, race, and sex discrimination to be barred, such a result has not been urged by defendants.

The Department has construed the Act to permit it to issue right-to-sue letters at a claimant's request prior to the expiration of the 150-day period. (*Carter* v. *Smith Food King*, (9th Cir. 1985) 765 F.2d 916, 923.)

Quite recently, in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1401, the court pointed out that it is a mistaken assumption that "a civil action is open only to those whose complaints the commission has refused to prosecute and overlooks the department's evident policy to permit any complainant to sue who wishes to, . . . [¶] . . . [¶] Thus, while the department no doubt pursues only cases it deems meritorious [citations], because its case load precludes the

pursuit of all such claims, any complainant who so wishes may bring a private court action."

In *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 an employee was fired for reasons he described as "falsely and fraudulently contrived." There had been no administrative or judicial determination to the contrary. The court held that the plaintiff had the right to seek punitive damages in his action. At page 218, footnote 8, the court noted, " . . . a right-to-sue letter is issued, even in advance of the 150 days, to any person who states in writing that he wants to withdraw his complaint and file a civil action."

The claimant does not have to wait the entire 150-day period to receive the right-to-sue letter from the Department and certainly does not have to wait the entire one year after receiving the right-to-sue letter to commence the action. It is clear that if at any point plaintiff believed she was the victim of age, sex or race discrimination, as she now attempts to allege in her complaints in this consolidated action, she could have filed a complaint with the Department, asked that the complaint be withdrawn, and that she receive a right-to-sue letter. This would have permitted her to have sued the district and the named individuals even before the termination hearing since she alleged in her complaint that she was evaluated differently, assigned students differently, and assigned work differently while on the job than were younger and/or white and/or male teachers. Alternatively she could have obtained the right-to-sue letter and brought an action at the same time she filed her petition in the first action. The first action was filed in December 1980 but was not determined until June 1981.

Complaints may be amended and continuances obtained to ensure that all applicable facts are brought before the court.

Thus while plaintiff may have an absolute right to bring suit under the Act, she does not have an absolute right to prevail. It is clear that rights under the Act may be waived in favor of pursuing another remedy. (See *Alcorn v. Anbro Engineering Inc.* (1970) 2 Cal.3d 493.) By a parity of reasoning, one may be barred by laches from pursuing the remedy. Plaintiff cannot ignore the fact that she was given an opportunity to present her charge that she was the victim of discrimination as a defense in the dismissal hearing and that her failure to do so may operate as a bar to her claims under the Act. We cannot say in every case that a plaintiff may wait the entire two-and-one-half-year period before asserting the charge of discriminatory treatment and still have the right to prevail. Such a result would undermine the necessary finality in teacher termination proceedings.

Similarly, plaintiff could have filed the notice required by the Tort Claims Act (Gov. Code, § 900 et seq.) when she first became aware that the district intended to dismiss her on what she now claims were discriminatory and illegal grounds. She received the accusation in May 1980; the dismissal hearing was not held until October of that year. If the public entity does not respond to the claim served pursuant to Government Code section 911.2 within 45 days, it is deemed denied (Gov. Code, § 911.6). There was time for plaintiff to have filed the notices and to have exhausted the administrative procedure she now claims she was precluded from doing.

Clearly what plaintiff was doing in the termination hearing and the first action was defending her dismissal only the ground that the Commission lacked jurisdiction to proceed against her since the district had not adopted uniform standards pursuant to the Stull Act. Having chosen to "put all her eggs in one basket," she can not come back years later and add others.

D. *The final judgment in the first action is res judicata as to all issues that were or could have been litigated in that action.*

It is axiomatic that a final judgment serves as a bar not only to the issues litigated but to those that could have been litigated at the same time. In *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, the California Supreme Court stated the California rule regarding the scope of res judicata as follows:

> "If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. [Emphasis in original.] The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigatable. [Citations.] . . . 'This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.'"

It has long been the law in California that any available defense should be asserted at the earliest opportunity and certainly at an administrative hearing. In *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37, the court stated: "It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court."

Scoggin v. Schrunk (9th Cir. 1975) 522 F.2d 436 is a federal case to the same effect. There, Scoggin's property was acquired by the City of Portland when it was sold for failure of the owner to pay an installment due under a bonded improvement assessment levied by the city. Scoggin sued in state court to get her property back, contending the city was unjustly enriched and that she did not have notice of the sale. She prevailed in the trial court and lost on appeal. The Supreme Court of Oregon declined to take the case. She brought a 42 United States Code section 1983 action in federal court, contending for the first time that her civil rights were violated in the taking. At page 437 the court had this to say, "the state judgment on the merits serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief."

Plaintiff's common law case is based on breach of the employment contract, conspiracy, and negligent and intentional infliction of emotional distress based on the alleged breach of contract; the civil rights case is based on plaintiff's wrongful treatment in the terms and conditions

of employment because of her age, sex or race. This is all superimposed on a final state court determination that she was terminated from her employment for incompetency. Simply put, plaintiff cannot prevail against defendants on the basis that their conduct toward her that caused her termination was wrongful in the face of a final state court determination in the first action that the district had the right to terminate her for incompetency. That plaintiff elected not to litigate at the hearing before the Commission her claims that she was discriminated against in violation of her constitutional and civil rights does not detract from the finding by the Commission, and independently by the superior court, that the district had cause to dismiss her.

In *City of Fresno v. Superior Court* (1987) 188 Cal.App.3d 1484 this court held that each of the causes of action of the real party in interest were necessarily premised, either expressly or impliedly, on the assertion that the civil service board's decision to uphold the removal of an employee was erroneous or unjustified. The court held that under the circumstances the employee was required to exhaust his administrative remedies by petitioning the court for a writ of mandate to set aside the board's decision as a prerequisite to filing his tort action.

Here, the first action was filed. The superior court denied the writ, upholding the action of the Commission. Since it has been finally determined through the writ procedure and through the appellate procedure that the district was entitled to dismiss plaintiff on the basis of incompetence, that judgment is binding as to all issues regarding that termination that were raised or could have been raised.

This court in *City of Fresno v. Superior Court, supra,* relied on *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465. In *Westlake,* the court concluded that a doctor must exhaust her administrative remedies to have her dismissal set aside before suing in tort and explained reasons for reaching that conclusion that this court approved.

Plaintiff has cited the case of *Myers v. County of Orange* (1970) 6 Cal.App.3d 626 for the specific proposition that the decision in an administrative hearing and writ of mandate proceeding that follows is not res judicata as to the issue of wrongful discharge, since she did not allege in those proceedings that her civil rights and constitutional rights had been violated. Plaintiff argues earnestly, but we are not persuaded.

In *Myers,* a widow filed an action to establish that her husband had been wrongfully discharged, alleging she lost death benefits as a result of such wrongful discharge. Her husband had been terminated from his employment with Orange County by a mailed "notice of discharge." When a form was presented to him to withdraw his retirement contributions from county employment, he signed the form. He died two months after he received the notice of discharge.

After the husband's death, the wife requested the county retirement board to hear her request to rescind the dismissal and reinstate her husband in employment up until the date of his death, so that she would be eligible for death benefits. Her letter requesting the hearing went to the county counsel's office. County counsel opined that the retirement board could not hold such a hearing,

reasoning that it had no jurisdiction since the separation from county service occurred from "resignation" not termination. The wife then petitioned for writ of mandamus to require the retirement board to set aside its decision not to hold a hearing and to compel it to hold a hearing. The county, through the retirement board, demurred to the petition. The demurrer was overruled and a trial was held on the petition, resulting in an order denying the writ of mandate. No appeal was taken.

Thereafter, plaintiff wife filed in superior court a complaint for damages for the allegedly wrongful discharge of her husband. The court held that the judgment in the mandate proceeding did not bar the tort causes of action before the court because the issues adjudicated in the mandate proceeding did not include any determination of whether or not plaintiff's husband was wrongfully discharged. (*Myers v. County of Orange, supra,* 6 Cal.App.3d at pp. 632-633.)

This case is obviously very different in that the hearing on the petition in the first action necessarily required a decision as to whether or not the district had cause to terminate plaintiff. The Commission determined through specific findings that there was cause to terminate plaintiff from her employment because of incompetency, which determination was upheld in plaintiff's first action. Just as clearly as denial of the writ of mandate in *Myers* was properly held not to bar the plaintiff's subsequent tort action, denial of the writ in plaintiff's first action should and does bar the instant actions.

E. *All defenses could have been asserted at the time of the administrative hearing, and claims could have been brought in the first action.*

As noted, Government Code sections 11505 and 11506 gave plaintiff the right and power to assert any defense to the incompetency charge, including defenses based on allegations that her constitutional and civil rights were being violated by defendants' actions. *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575 involved a similar procedure. In that case the plaintiff was a probationary teacher. The 1972 procedure for dismissal of a probationary teacher was somewhat different than the 1980 procedure for dismissal of a permanent teacher, such as plaintiff. The 1980 procedure gave the permanent teacher a more elaborate hearing before the Commission, consisting of an administrative law judge and two lay members, whereas the dismissal hearing for the probationary teacher was before a single hearing officer.

In the *Bekiaris* case, a hearing was held before the hearing officer with the district contending that the petitioner was persistent in his violation of school rules and that such violation constituted grounds for his dismissal. In opposition, petitioner offered testimony that was not received in evidence by the hearing officer that the real reason for his termination was his exercise of his First Amendment rights. The hearing officer found that the evidence did not otherwise support the district's charges. The district's board of trustees, on the basis of the record before the hearing officer, disagreed as to the sufficiency of the evidence to support the charges, but nevertheless

refused to reach the defense that petitioner was terminated because of his exercise of constitutional rights. The superior court refuse to set aside the board's action.

The Supreme Court found that the hearing officer's failure to receive evidence as to the asserted reason for termination (the exercise of his constitutional rights) resulted in a legal error correctable by writ of mandate. It held that "when a probationary teacher demands a hearing relative to his impending dismissal . . . and seeks . . . to present evidence tending to show that he was dismissed . . . for the exercise of constitutional rights, that evidence must be received substantively and findings must be made concerning it." (*Bekiaris v. Board of Education, supra,* 6 Cal.3d at p. 592.) Since the primary distinction between probationary teachers and permanent teachers is the attainment by the permanent teachers of more job security and more rights, it would hardly be logical to suggest that a right given to a probationary teacher in a dismissal hearing would not similarly be available to a permanent teacher. Thus, plaintiff was entitled to raise the issue of alleged constitutional and civil rights violation at the time of the dismissal hearing. (See also *Griswold v. Mt. Diablo Unified Sch. Dist.* (1976) 63 Cal.App.3d 648.)

Here plaintiff has alleged conspiracy among the defendants who "set her up" by violating her constitutional and civil rights. Yet plaintiff admits in her complaint that the discrimination defense was not raised at the administrative hearing. Neither was the issue raised in the first action. It is just such a case as this in which

such allegations must be brought at the earliest opportunity, in this case before the Commission, so that the matter can be resolved.

There can be no justification for plaintiff's position that she should be permitted to fail to assert at the administrative hearing constitutional and civil rights violations as reasons that made her termination wrongful, fail to prevail on the writ without attempting to urge or to bring before the court those reasons, and then be allowed to recover damages in this consolidated action that resulted from termination of her employment alleged to be wrongful based on those same reasons. As the court pointed out in *Westlake Community Hosp. v. Superior Court, supra,* 17 Cal.3d 465, 476: "If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision . . . ; an individual should not be permitted to endlessly increases damages by foregoing available internal remedies."

F. *The federal decision in res judicata.*

As we have seen, the United States Court of Appeals, Ninth Circuit, in *Takahashi v. Bd. of Trustees of Livington, supra,* 783 F.2d 848 concluded that plaintiff's federal court action was barred by the res judicata effect of the prior state court judgment in the first action.

Plaintiff has cited the case of *Merry v. Coast Community College Dist.* (1979) 97 Cal.App.3d 214 as support for

her assertion that the court's acceptance of the res judicata defense in the federal court case does not compel the striking of her causes of action in this consolidated action on the basis of res judicata. In the cited case, the plaintiff alleged that the defendant college had deprived him of his property interest in a television film series without due process by coercing him through threats and intimidation to sign a contract waiving his interest in the series. He filed an action in federal court under the Civil Rights Act and the First and Fourteenth Amendments to the United States Constitution. A summary judgment was granted, the court finding no genuine issues of material fact and concluding that the complaint did not state a federal cause of action. The plaintiff then filed in state court seeking rescission of the contract for fraud, undue influence and mistake of law. The state court sustained defendant's demurrer without leave to amend on the force of the res judicata effect of the federal court judgment.

The plaintiff contended that res judicata did not operate as a bar to his action since the federal court failed to pass on state claims and that different primary rights were involved. The defendant countered that the state claim could have been raised and considered under pendent jurisdiction and the rule against splitting causes of action should preclude plaintiff's suit in the state court. The court first noted that "It clearly appears that the federal court would have declined to exercise its pendent jurisdiction to adjudicate plaintiff's state claims had they been raised." (*Merry v. Coast Community College Dist., supra,* 97 Cal.App.3d at p. 221.) The court then concluded

that the summary judgment in the federal action was not a bar to the state action.

There is a very significant difference here that plaintiff ignores: the summary judgment in her federal court action was based precisely on the preclusive effect of the prior state judgment in the first action on the same cause of action. It would be absurd to say that the federal court should have granted summary judgment and dismissed the state claims for adjudication in state court when the dismissal of the federal claims was based on the preclusive effect of the existing state court final judgment in the first action. However we do not need to decide whether the federal court judgment is res judicata since we have concluded that the state court's denial of plaintiff's petition for writ of mandate in the first action does bar these consolidated actions.

The judgment is affirmed. Defendants are awarded their costs on appeal.

/s/ Hamlin
J.

WE CONCUR:

/s/ Martin
Acting P.J.

/s/ Ballantyne
J.

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MERCED

MITSUE TAKAHASHI, Plaintiff, vs. BOARD OF EDUACATION OF LIVINGSTON UNION SCHOOL DISTRICT, etc. et al., Defendants.	CASE NO. 70836
MITSUE TAKAHASHI, Plaintiff, vs. LIVINGSTON UNION SCHOOL DISTRICT, etc. et al., Defendants.	CASE NO. 71869 (Filed March 16, 1987)

Defendants have moved for summary judgment in these consolidated actions.

This court concludes that previous State and Federal court litigation bars these actions on the basis of res judicata.

There are no material facts in dispute and defendants are entitled to a judgment as a matter of law.

The issues here present were litigated or could have been litigated in the prior administrative mandamus proceeding.

The motion is granted in both actions.

Dated: March 16, 1987

/s/ GEORGE C. BARRETT
Judge of the Superior Court

EXHIBIT C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION et al., *Plaintiffs and Appellants,* v. GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT et al., *Defendants and Respondents.*	5 Civil No. 6622 (F000235) (Super. Ct. No. 65267) *OPINION* (Filed June 20, 1983)

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Affirmed.

Tuttle & Tuttle, Ernest H. Tuttle III and Kay M. Tuttle for Plaintiffs and Appellants.

Mary Louise Frampton as Amicus Curiae on behalf of Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Paul M. Loya and Brian M. Libow for Defendants and Respondents.

* * *

Plaintiffs, California Teachers Association (CTA) and Mitsue Takahashi, appeal from the trial court's judgment which denied a writ of mandate commanding defendants,

the Governing Board of the Livingston Union School District, the Commission on Professional Competence of the Livingston Union School District and the Livingston Union School District (district) to set aside their decision terminating the district's employment of Takahashi, a permanent certified schoolteacher. We affirm the judgment.

The principal issue on appeal is whether the district's failure to adopt uniform objective guidelines for evaluation and assessment of the classroom management performance of all its certificated personnel, pursuant to Education Code section 44660[1] et seq. (the Stull Act)[2]

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[1] Section 44660 provides as follows:

"It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

"This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes."

All statutory references are to the Education Code unless otherwise specified.

[2] Statutes 1971, chapter 361, section 40, page 726.

precludes it from giving to the affected employee a valid 90-day written notice of charges of incompetency as required by section 44938.[3]

STATEMENT OF FACTS

Mitsue Takahashi was an eighth grade teacher at Selma Herndon School in the Livingston Union School District in Livingston, California. She had been employed by the district, at the time of the hearing before the Commssion on Professional Competence, for a period of 21 years. On five occasions, during the period from January 9, 1978, through May 16, 1979, Dale Eastlee, principal

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[3] Section 44938 provides as follows:

"The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employeee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3 of this part, if applicable to the employee. 'Unprofessional conduct' and 'incompetency' as used in this section means, and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932."

at Selma Herndon School, observed discipline problems in the classroom of Takahashi. These problems included students fighting, playing soccer in the classroom, yelling over the school intercom, yelling out the back door of the classroom, wrestling, throwing pencils and other disruptive activities. Additionally, a maintenance worker who was working in Takahashi's classroom on May 8, 1978, overheard students using vulgar language. He did not hear Takahashi take any action to terminate use of that language or to caution against recurrence.

In August 1979, Hamilton Brannan became principal at Selma Herndon School. He observed Takahashi's classroom on six occasions between September 26, 1979 and March 20, 1980. Each time, he noted a lack of planning and focus in Takahashi's teaching. He once heard a student screaming at Takahashi for so long with no response from Takahashi that he was forced to remove the student from the classroom. He observed students engaging in a tug-of-war over some tape, which Takahashi was unable to stop, and students disregarding Takahashi's instructions on classroom demeanor in shouting out questions and answers. On April 15, 1980, at the request of Brannan, a principal at a school in a neighboring district observed Takahashi's classroom performance. That person, from outside the district, noted that Takahashi's questions to the class prompted loud and confusing total group responses, that she failed to draw any response from the quieter students, and that she ignored inappropriate student behavior which resulted in an unorderly classroom environment. Twice during the 1979-1980 school year students were transferred out of Takahashi's class at the request of the students' parents. The reasons

stated for the transfer were disorder and lack of discipline in the classroom which interfered with the students' learning.

On January 8, 1980, the superintendent of the district handed Takahashi a letter over his signature notifying her of specified acts of incompetency. Appended to that letter was a formal evaluation form dated November 15 1979 prepared by Brannon, a copy of a letter from the superintendent to Takahashi dated April 23, 1979, also notifying her of specified acts of incompetency, and a copy of a formal evaluation form prepared by Dale Eastlee, dated April 18, 1979. Later, a notice of accusation, dated June 26, 1980, was served upon Takahashi. Appended to that notice was an accusation filed with the governing board of the district alleging that cause existed to dismiss Takahashi. Takahashi demanded and received a hearing before the Commission on Professional Competence (commission) of the district, Rudolph H. Michael, Administrative Law Judge, presiding. On November 6, 1980, the commission issued its decision containing findings of fact and determining, among other things, that cause for dismissing Takahashi had been established and that the notice given to her on January 8, 1980, complied with the procedural requirements of section 44938.

Takahashi commenced a proceeding in mandamus (Code Civ. Proc., § 1094.5) to compel the commission to set aside its decision. In that proceeding, the trial court found as follows: (1) cause for dismissal had been established, (2) each of the notices which the district gave Takahashi complied with the procedural requirements of section 44938 and the evaluations attached to those

notices complied with section 44660, et seq. and (3) Takahashi's alteration of her testimony before the commission constituted unclean hands.

DISCUSSION

Jurisdiction To Act Upon The Accusation Of Incompetency

Initially, we note that the trial court's determination that the notice given to Takahashi on January 8, 1980, complied with the procedural requirements of section 44938 necessarily involves interpretation of the statute. Such interpretation is a question of law, and an appellate court is not bound by evidence presented in the trial court. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) In construing a statute, the fundamental rule is that the appellate court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658.) To ascertain such intent the court first looks to the words themselves for the answer. (*Ibid.*) Moreover, the court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. (*Id.*, at pp. 658-659.) The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*Id.*, at p. 659.)

Applying these rules to interpret the Stull Act, we begin with section 44660. That section expresses the intent of the Legislature that governing boards

"establish a uniform system of evaluation and assessment of the performance of all certificated personnel. . . .The system shall involve the development and adoption . . . of objective evaluation and assessment guidelines. . . ." Nowhere in section 44660 is there any statement about the consequence to the district of the governing board's failure to establish such a system or to adopt such guidelines. Neither do we find in other sections of the Stull Act a statement that any disability or consequence flows from the failure to adopt guidelines for evaluation and assessment of the performance of certificated employees.

We do find in section 44932 specific provisions which limit the causes for dismissal of permanent employees. One of the causes for dismissal is "incompetency" (§ 44932, subd. (d)). In the second paragraph of section 44934 appears the requirement that "Any written statement of charges of . . . incompetency shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his defense. It shall . . . also set forth the facts relevant to each occasion of alleged . . . incompetency." Section 44938 provides additional requirements which must be satisfied before the governing board of any school district may act upon any charges of incompetency. These provisions include the requirement that the written notice shall include the evaluation made pursuant to section 44660 et seq.

Plaintiffs do not contend that incompetency is not a proper cause for dismissal of Takahashi. Neither do they urge any procedural deficiency in the contents of the notices of incompetency under the statutory provisions

reviewed above. Their sole contention is that the Stull Act evaluation appended to the notice of incompetency given to Takahashi on January 8, 1980, does not satisfy the requirement of section 44938 that the evaluation be made pursuant to section 44660 et seq. Plaintiffs argue the evaluation could not have been made as required in the absence of the guidelines mandated by section 44660.

In *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251, the court addressed the issue of compliance with section 13407. That section is identical with section 44938 of the Reorganized Education Code (Stats. 1976, ch. 1010, as amended by ch. 1011, eff. April 30, 1977). The court concluded that the district did not comply with section 13407 for several reasons. One reason was the district's failure to comply with section 13489 (now § 44664) by not giving the teacher an evaluation of his performance during the school year in which he was given notice of his alleged incompetency. The district was, therefore, without jurisdiction to proceed on the charges of incompetency. (*Id.*, at pp. 258-259.)

Plaintiffs do not dispute the fact that an evaluation of Takahashi's performance accompanied each of the notices of incompetency. In the notices, the district described the attached evaluations as having been made pursuant to section 44660 et seq. We believe the evaluations which the district attached to the notices of incompetency to Takahashi complied with the provisions of section 44664. They were provided within the time limits specified in that section. In addition, they included recommendations as to areas of improvement in the performance of Takahashi as required by that section. They also contained a

notice to Takahashi in writing that she was not performing her duties in a satisfactory manner and they described such unsatisfactory performance. Finally, the evaluators conferred with Takahashi after the evaluations and made specific recommendations as to areas of improvement in her performance. They also provided assistance to her in improving her performance. This assistance included provision of textbooks and a course of instruction on improving classroom discipline and control and visits to other classrooms.

We find nothing in the *Tarquin* decision to support a conclusion that the district lacked jurisdiction to proceed on the charges of incompetency against Takahashi. Neither do we believe it is logical or reasonable to conclude that it was the intent of the Stull Act that such be the consequence of failure of the district's governing board to adopt guidelines for assessing teacher incompetency. The numerous safeguards which the framers of that legislation included to assure full and complete due process in any attempted dismissal are inconsistent with such an intent. The requirement of a full statement of the charges and a specification of the acts, omissions and facts relevant to each occasion of alleged incompetency are but a few of these safeguards. Additionally, we note the provisions of section 44944 governing the conduct of the hearing by the Commission on Professional Competence on the charges against the teacher and governing the composition of the Commission. The two members selected by the governing board and the teacher must hold a currently valid credential and "have at least five years' experience within the past ten years in the discipline of the employee." (§ 44944, subd. (b).)

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One final consideration arising from the particular nature of the charged incompetency in the present case convinces us that the Legislature never intended that failure to adopt the uniform written guidelines called for by section 44660 result in a wholesale jurisdictional bar to the dismissal of incompetent employees. The essence of the charge against Takahashi was that she was unable to maintain an orderly classroom.[4] Maintenance of appropriate classroom behavior is extremely difficult to quantify; one can imagine (with horror) uniform guidelines framed in terms of permissible decibel levels or schedules of acceptable incidents of misbehavior per unit of time or student population. The lack of empirical standards applicable to this area of teacher competence mandates that evaluation of teacher performance be left to those with the professional experience and skill to meaningfully assess classroom order – fellow educators assisted by a judicial officer, as is contemplated by section 44944.

The only extrinsic aid to interpretation provided by the briefs is the reference by the amicus curiae to a law

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[4] It is undisputed that Takahashi's students met the academic standards appropriate to measure the skill with which she imparted information relevant to the subjects she covered. We view as no less important than academic knowledge the teaching of standards of civilized behavior necessary to the functioning of society. Order and discipline should never be exalted to the detriment of learning or of the concepts basic to a free society, but neither should appropriate group behavior be discarded as irrelevant to the educational process. A school which produced well-educated sociopaths would be as inimical to democracy as one which created well-educated robots.

review article written by the author of the Stull Act,[5] the legislation which enacted the relevant provisions of the Education Code.

In construing a statute, the motives or misunderstandings of individual legislators who cast their vote for it may not be considered as evidence of legislative intent. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589.) This rule applies even though the motives offered are those of the author of the legislation being construed. (*Id.*, at pp. 589-590.) A legislator's statement is evidence of legislative intent only if it provides the history of the legislation – events which occurred or arguments made during its passage. (*California Teachers Assn. v. San Diego Community College Dist., supra,* 28 Cal.3d 692, 700; *In re Marriage of Bouquet, supra,* at p. 590.) These standards for consideration of legislators' statements go to admissibility, rather than weight, of the evidence offered. (*California Teachers Assn., supra,* at p. 701.)

Nothing in the article written by Mr. Stull is a reiteration of legislative discussion or events or gives an indication of arguments made during consideration of the statute by the Legislature. Therefore, this court may not consider that article as evidence of the Legislature's intent in enacting the Stull Act.

We have discovered only one judicial expression of statutory interpretation relevant to the Education Code sections at issue. That appears in *Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist.* (1974) 42

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[5] Stull, *Why Johnny Can't Read – His Own Diploma* (1979) 10 Pacific L.J. 647.

Cal.App.3d 328. In that case, a school district had adopted the guidelines called for by section 44660, and teachers' unions sought to enjoin application of the guidelines because the district had not consulted with the teacher organizations (but had utilized individual teachers) in formulating the guidelines. (*Id.*, at pp. 331-332.) In holding that the Stull Act was not subject to the "meet and confer" requirements of other legislation, the Court of Appeal stated:

> "Nor do we think that the Stull Act is exclusively a tenure regulation. As indicated above, in Stull, 'intent of the Legislature [was] to establish a uniform system of evaluation and assessment of the performance of certificated personnel' by requiring 'the development and adoption by each school district of objective evaluation and assessment guidelines' (§ 13485 [recodified as 44660 by Stats. 1976, ch. 1010, § 2, p.2384]). Stull does not require that school districts use the guidelines for determining tenure *nor does it require any other consequence. While many school districts will undoubtedly utilize the evaluation and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations.*" (*Id.*, at p. 336, emphasis supplied.)

We interpret the opinion in *Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist., supra,* 42 Cal.App.3d 328 to mean that the failure of the district to establish guidelines as required by section 44660 does not have any effect upon the district's powers. Admittedly, that court was not presented with factual circumstances in which any consequences could arise, since the district there had adopted the required guidelines. Nonetheless, we believe an interpretation of sections 44660 and 44938 which entirely prevents the district from dismissing

incompetent teachers would not be consonant with that court's view of the Stull Act.

Plaintiffs argue that guidelines are essential to an objective evaluation and that the importance of such an evaluation justifies the consequence they assert in this case. To illustrate the importance of the objective standards, our attention is directed to *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278. We do not find that case material to the resolution of the issue of whether failure to adopt guidelines for assessing teacher incomptency precluded compliance with section 44938 in this case. *San Dieguito* and the cases cited therein uniformly involve causes for dismissal other than incompetency – such as excessive absences, sex offenses, or drug violations. The danger in such situations (where the offense purporting to justify dismissal involves questions of moral turpitude or unfitness to teach) that a lack of objective standards will vest unbridled discretion in the districts and trial courts, is not present where incompetence is alleged and is, as in this case, supported by allegations of specific conduct. The evidence presented to the commission, and upon which the trial court exercised its independent judgment, established that Takahashi received notice of the allegations of incompetence far in advance of the filing of accusations of incompetency; she was provided with suggestions for improvement; and she was given an opportunity to demonstrate improvement in her performance in the relevant particulars. If, as we believe, the Stull Act was intended to encourage regular evaluations

and to avoid arbitrary evaluations and dismissals, common sense dictates there was compliance with section 44938 in this case.

Sufficiency of the Evidence

The decision of the Commission on Professional Competence, which the trial court reviewed pursuant to plaintiffs' petition for writ of mandate, found cause for dismissal of a permanent certified employee of the school district. On such a review, the trial court must exercise its independent judgment as to the evidence presented to the commission. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314; *San Dieguito Union High School Dist. v. Commission on Professional Competence, supra,* 135 Cal.App.3d 278, 283.) The trial court applied the independent judgment standard in the present case.

The trial court's judgment must be upheld on appeal if supported by substantial evidence. (*Ibid.*) All conflicts in the evidence must be resolved by the appellate court in favor of the party prevailing in the superior court, and that party must be given the benefit of every reasonable inference in support of the judgment. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence, supra,* at pp. 313-314.) Where the trial court's findings are challenged, based on insufficiency of the evidence, the appellant bears the heavy burden of showing that there is no substantial evidence to support those findings. (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1979) 88 Cal.App.3d 823, 829.) The reviewing court starts with the presumption that the record contains evidence to

sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (*Ibid.*) Substantial evidence means evidence which is of ponderable legal significance – evidence that is reasonable in nature, credible and of solid value. (*H. Russell Taylor's Fire Prevention Service, Inc. v. Coca-Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 726.) As the trier of fact, the trial court is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for so doing, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. (*Johnson v. Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880.)

Applying the above rules to the present case, we conclude there was sufficient evidence to support the trial court's decision that "[i]n the aggregate, the events and facts [found by the court to be true] constitute cause for the dismissal of [Takahashi] . . . ."

The judgment of the trial court is affirmed.

/s/ Hamlin
J.

WE CONCUR:
/s/ Andreen
Acting P. J.
Martin
J.

EXHIBIT D

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

CTA; MITSUE TAKAHASHI, Petitioners, v. LIVINGSTON UNION SCHOOL DISTRICT, et al., Respondents.	No. 65267 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on May 1, 1981, before the court, Mr. Ernest H. Tuttle III appearing as counsel for the petitioner and Mr. Paul M. Loya appearing as counsel for the respondent. The court having examined the record and having heard the argument of the parties, the cause having been submitted to the court for decision, and the court being fully advised in the premises and having independently reviewed the evidence, now makes findings of fact as follows:

FINDINGS OF FACT

1. Harold H. Thompson made the accusation in his official capacity of Superintendent of the Livingston Union School District.

2. At all times material herein, petitioner was employed as a permanent certificated employee of the District.

3. Two separate notices of incompetency were personally served on petitioner on April 24, 1979 and January 8, 1980, respectively. Each of the notices specified the nature of the incompetency and gave specific instances of behavior with such particularity as to furnish to petitioner an opportunity to correct her fault and to overcome the grounds for the charge of incompetency. Each of the notices included an evaluation made pursuant to Article 11, commencing with Section 44660, of Chapter 3 of Part 25 of the Education Code.

4. On May 12, 1980, the Superintendent filed a statement of charges against petitioner with the Governing Board of the District.

5. On May 12, 1980, the Governing Board of the District resolved to give notice of intention to dismiss to petitioner.

6. On May 12, 1980, petitioner was personally served with the notice of intention, a statement of charges, and a copy of the application provisions of the Education Code.

7. On June 9, 1980, petitioner requested a hearing.

8. On January 9, 1978, in petitioner's classroom between 1:00 and 1:45 p.m., petitioner failed to exercise classroom and student control as alleged in paragraph 1 of the statement of charges.

9. On October 16, 1978, at 2:45 p.m., students were playing soccer inside petitioner's classroom, screaming loudly, and running in and out of the room. This activity continued for approximately ten minutes.

10. On November 3, 1978, at 1:05 p.m., students were yelling in class and were disturbing office personnel by yelling over the intercom.

11. On November 17, 1978, at 10:00 a.m., students were observed standing at the backdoor of petitioner's classroom yelling to students on the playground.

12. On May 16, 1979, from 1:00 to 1:15 p.m., in and near petitioner's classroom, three boys were wrestling and yelling outside the backdoor. Students were wandering around the room, visiting and yelling. One boy threw a pencil across the room to a friend, telling him to sharpen it for him. One girl was reading a magazine and told petitioner "she didn't feel like doing work that day." She continued to read the magazine. One girl sat outside for the duration of the period, stating simply that she did not want to go to class.

13. On June 8, 1979, Joe Holt, a maintenance man, overheard vulgar language by various students in petitioner's class and in her presence. These conversations were lengthy and loud enough for Holt to hear while working under the sink, and caused Holt to stand up to see if petitioner was still in the room.

14. On September 26, 1979, in petitioner's classroom, several conversations not related to the lesson were going on between students while she tried to conduct the lesson. She often asked questions and immediately answered them herself, thus not giving students a chance to answer. The petitioner failed to realize which issues students had strong feelings about, and thus missed great opportunities for discussion. Class time and material were used with no demonstrated objective, learning or evaluation.

15. On October 24, 1979, petitioner's class was observed from 10:45 to 11:17 a.m. There was no planning of lessons, and no learning objective or focus for the lesson. Her plan book showed few lessons actually planned in advance and clearly determining the objective.

16. On October 23, 1979, a student was transferred to another room so she could resume learning. This student was unable to work effectively in petitioner's classroom because of noise and confusion in the class.

17. On November 14, 1979, a girl student was screaming at petitioner, "you don't have to poke me, just tell me to shut up." Petitioner apologized but otherwise ignored the screams, and turned to the filmstrip projector to start the lesson. The screaming continued for some time until the student saw the principal in the doorway.

18. On November 27, 1979, petitioner's class was in a disorganized and uncontrolled state. Some groups of students were working, others were talking, three boys were wrestling over a roll of masking tape until told to stop. Petitioner did not respond to the noise or movement

but walked around talking to individual students. According to the lesson plans, the class should have been involved in a whole group activity.

19. On January 25, 1980, petitioner exhibited inadequate methods and techniques of teaching. The task analysis for permutation problems in math was prepared but not followed. There was no anticipatory set to establish the purpose and focus of the lesson. There was no opportunity for students to restate what they had learned.

20. On March 20, 1980, from 9:45 to 10:04 a.m., petitioner's eighth grade class diagrammed sentences and later changed to math. Students shouted out answers or requests for help even though petitioner asked them to raise their hands. To get students' attention, she shouted over their voices, but this made little difference in the students' attention.

21. On April 15, 1980, questions posed by petitioner on square roots were formulated in such an unclear manner that they prompted loud and confusing total group responses. Petitioner did not manage the classroom environment adequately to provide for effective teaching and active learning. Students were allowed to behave in a disorderly manner (loud talking, laughter, jokes, mimicking) without any consequences or demands from petitioner that they stop this behavior.

22. On April 22, 1980, a parent requested that her child by transferred from petitioner's class, on the grounds that there was no discipline in her classroom, nobody understood the assignments she gave, and the students who want to study are unable to do so because of the disorder.

23. On May 8, 1978, and on numerous subsequent occasions, petitioner was informed of the need to correct her lack of control over the students and of concern with her relations with students and parents.

24. Petitioner's testimony that the events described in paragraph 18 occurred during a break between classes, and the the observation described in paragraph 21 was altered after it had been shown to her was false and not entitled to credit.

25. Throughout the time periods in issue here, petitioner was given the opportunity to respond in writing to the various charges against her, but never did so respond within the allotted time periods.

From the foregoing facts, the court concludes:

CONCLUSIONS OF LAW

1. In the aggregate, the events and facts described above constitute cause for the dismissal of petitioner from her position as a permanent certificated employee of the District under Section 44932(d) of the Education Code.

2. Each of the notices described in finding 3 complied with the procedural requirements of Section 44938 of the Education Code. The evaluations attached to those notices complied with Section 44660, et seq. of the Education Code.

3. The facts described in finding 24 constitute unclean hands by the petitioner.

Dated: JUN 9-1981

DONALD R. FRETZ
DONALD R. FRETZ
Judge of the Superior Court

EXHIBIT E

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, No. F008684

S007019

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK
(Filed October 12, 1988)

MITSUE TAKAHASHI, Appellant,
v.
BOARD OF EDUCATION OF LIVINGSTON UNION SCHOOL DISTRICT et at., Respondents.

MITSUE TAKAHASHI, Appellant,
v.
LIVINGSTON UNION SCHOOL DISTRICT, Respondents.

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX F

RELEVANT STATUTES

1. California Government Code

Cal. Gov't Code § 12920 provides:

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

Cal. Gov't Code § 12921 provides:

The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right.

Cal. Gov't Code § 12930 provides:

The department shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the state as are necessary to carry out the purposes of this part.

(b) To meet and function at any place within the state.

(c) To appoint attorneys, investigators, conciliators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the functions and duties of the department pursuant to this part.

(f)(1) To receive, investigate and conciliate complaints alleging discrimination in employment on the

bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, marital status, national origin, or ancestry.

(2) To receive, investigate, and conciliate complaints alleging a violation of Section 51 or 51.7 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(g) In connection with any matter under investigation or in question before the department pursuant to a complaint filed under Section 12960, 12961, or 12980:

(1) To issue subpoenas to require the attendance and testimony of witnesses and the production of books, records, documents, and physical materials.

(2) To administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits.

(3) To issue written interrogatories.

(4) To request the production for inspection and copying of books, records, documents, and physical materials.

(5) To petition the superior courts to compel the appearance and testimony of witnesses, the production of books, records, documents, and physical materials, and the answering of interrogatories.

(h) To issue accusations pursuant to Section 12965 or 12981 and to prosecute such accusations before the commission.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, marital status, national origin, or ancestry.

(j) To investigate, approve, certify, decertify, monitor, and enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Section 12990.

(k) To render annually to the Governor and to the Legislature a written report of its activities and of its recommendations.

Cal. Gov't Code § 12993 in relevant part:

(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

. . . .

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any

manner or way, to limit or restrict the application of Section 51 of the Civil Code.

2. California Education Code

Cal. Ed. Code § 44660 provides:

It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

Cal. Ed. Code § 44664 provides:

Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory

manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 44660, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board.

Cal. Ed. Code § 44932 provides:

No permanent employee shall be dismissed except for one or more of the following causes:

(a) Immoral or unprofessional conduct.

(b) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188, Statutes of 1919, or in any amendment thereof.

(c) Dishonesty.

(d) Incompetency.

(e) Evident unfitness for service.

(f) Physical or mental codition unfitting him to instruct or associate with children.

(g) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

(h) Conviction of a felony or of any crime involving moral turpitude.

(i) Violation of Section 51530 of this code or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

(j) Violation of any provision in Sections 7001 to 7007, inclusive, of this code.

Cal. Ed. Code § 44938 provides:

The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature therof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3 of this part, if applicable to the employee. "Unprofessional conduct" and "incompetency" as used in this section means,

and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932.

Cal. Ed. Code § 44941 provides:

The notice of suspension and intention to dismiss, shall be in writing and be served upon the employee personally or by United States registered mail addressed to the employee at his last known address. A copy of the charges filed, containing the information required by Section 11503 of the Government Code, together with a copy of the provisions of this article, shall be attached to the notice. If the employee does not demand a hearing within the 30-day period, he may be dismissed upon the expiration of 30 days after service of the notice.

Cal. Ed. Code § 44944 provides:

(a) In the event a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, provided, however, that the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency therein, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior

court. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such continuance; provided, however, that such extension shall not include that period of time attributable to an anlawful refusal by either party to allow the discovery provided for in this section.

If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in Section 2034 of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his motion, shall be the superior court of the county in which the hearing will be held.

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters

which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be a hearing officer of the State Office of Administrative Procedure who shall be chairman and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, such failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district

initiating the dismissal and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote and the commission shall prepare a written decision containing findings of fact, determinations of issues and a disposition either:

(1) That the employee should be dismissed.

(2) That the employee should not be dismissed.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with the provisions of this section, as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

(d)(1) If the member selected by the governing board or the member selected by the employee is employed by any school district in California, such member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district.

(e) If the governing board orders the dismissal of the employee, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the hearing officer; and the state shall pay any costs incurred under subdivision (d)(2) above, and the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The State Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations and forms for the submission of such claims. The employee and the governing board shall pay their own attorney fees.

If the governing board orders that the employee not be dismissed, the governing board shall pay all expenses of the hearing, including the cost of the hearing officer, and any costs incurred under subdivision (d)(2) above, and the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney fees incurred by the employee.

3. California Code of Civil Procedures

Cal. Code Civ. Proc. § 1094.5 provides in relevant part:

> (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or oficer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court.
>
> . . . .
>
> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
>
> (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.
>
> . . . .
>
> (f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it

may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

. . . .